

word and that he carried the bag. His reason for his taciturnity that night was that he was not talkative. And DW2 who gave his evidence after the accused also said the accused was not talkative. My view, however, is that there was no conversation at all between the accused and Kloi as there was no such meeting between them; the coincidental meeting of the accused with this Kloi at 3am in the morning when he woke up thinking it was dawn, and his becoming a good Samaritan carrying a bag for Kloi without question, is nothing more than a fanciful invention to extricate himself from the charges.

His fanciful story did not end there. He stated that he did not untie the sack which Kloi requested him to carry, that he did not ask Kloi what it was, and that was because he and Kloi were fellow Siamese and Kloi had asked for a favour. Thus he did not know what the sack carried. But as it turned out he did think it was something familiar. He admitted later that he thought the sack contained fertilizer as the sack was a fertilizer sack and he thought the contents were fertilizer in powder form. The court told him to feel the said sack (P5A) with the 11 packages of drugs (which were found in it) inside the sack and asked him if the contents felt like powder. His answer was, 'not like powder'. When he was asked to explain how he could say that on that day it was fertilizer in powder form, he lamely said, 'The one I carried was in powder form - I cannot explain.'

Considering all the foregoing in the totality of the evidence adduced including the fact that the accused carried the sack in the dead of night, that he dropped the incriminating sack and ran when the police identified themselves, the presumption that he knew that the raw opium in the sack was raw opium and that he also knew that the morphine in the sacks was morphine has not been rebutted on the balance of probability. I also find that the presumptions that he was trafficking in the raw opium and in the morphine as are specified in the first and second charges respectively have not been rebutted on the balance of probability. I therefore find him guilty and convict him of both the charges.

Order accordingly.

Solicitors: Yusuf, Lee, Pathma & Marbeck.

Reported by Yap Shao Sin

A YK Fung Securities Sdn Bhd v Ronald Yeoh Kheng Hian

HIGH COURT (IPOH) - CIVIL SUIT NO 23-550-86
ABDUL MALEK J
26 AUGUST 1989

B *Civil Procedure - Stay of execution - Matter of discretion - Special circumstances of the case - Writ of seizure and sale - Disclosure of full assets and liabilities - Rules of the High Court 1980, O 47 r 1(3)*

Civil Procedure - Summary judgment - Appeal against - Whether triable issues raised - Whether contract had been made between parties - Alleged contract made on behalf of third party - Admissibility of oral evidence

C

Contract - Debit note unsigned - Whether contract made between parties - Alleged contract made on behalf of third party - Oral evidence brought to contradict terms of contract - Whether admissible - Evidence Act 1950, s 92

D The plaintiff obtained summary judgment for \$607,347.76 together with interest and costs arising from a claim in respect of the defendant's purchase of 500,000 shares ('the shares') in Everpeace Corporation. The defendant executed a margin agreement with the plaintiff which allowed him to buy and sell at the exchange. By the terms of the margin agreement, the defendant was to pay the plaintiff a margin deposit equivalent to 30% of the market value of the shares bought. The cost of the shares at the time of purchase was \$758,250. The defendant paid \$227,475 and a further \$1,562.20 being interest for October 1985. Statements of accounts were sent to the defendant from May 1986 to April 1987. The defendant appealed against the summary judgment and applied for a stay of execution pending appeal to the Supreme Court.

F The plaintiff had argued that oral evidence was not admissible in view of s 92 of the Evidence Act 1950. It was submitted that this did not apply where the documents do not constitute a contract as the debit note for the purchase of the shares was not signed by the defendant although his name was typed in; and it stated that the shares were bought on the defendant's order. Further, the defendant alleged that the contract was not between him and the plaintiff.

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Held, dismissing the defendant's appeal and application for stay of execution:

(1) The relevant debit note stated the name of the defendant in his personal capacity and the defendant had signed the margin agreement with the plaintiff. He even paid the 30% deposit required and paid interest. He was subsequently furnished with the relevant monthly statements of accounts to which he had no objections, protests or queries. Further, the reference to another proceeding between the plaintiff and the third party is founded on a different transaction. The allegation that this contract was between the third party and the plaintiff therefore failed.

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I (2) Where documents clearly state that goods were ordered by one party, they should not be allowed to bring oral evidence to contradict the terms of the contract and to show that the goods were ordered for another. As such, no triable issue has been raised by the defendant.

(3) Apart from the averments of the defendant, it cannot be said that the plaintiff was in a state of poverty even if it used the judgment sum to pay off its other liabilities. Further, the defen-

dant had not disclosed his assets and liabilities in full under O 47 r 1(3) of the Rules of the High Court 1980 for a stay of the writ of seizure and sale. A deposit of \$3,000 for an appeal where the judgment sum is for \$60,347.76 can hardly be a substantial guarantee should the defendant fail in his appeal.

[Editorial Note: The defendant has appealed to the Supreme Court vide Civil Appeal No 03-80-89.]

Cases referred to

- 1 *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124 (folld)
- 2 *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 (refd)

Legislation referred to

Evidence Act 1950 s 92
Rules of the High Court 1980 O 47 r 1(3)

Paul P Subramaniam (Lee Yen Seong with him) for the plaintiff.

Romesh Roy for the defendant.

Cur Adv Vult

Abdul Malek J: The learned senior assistant registrar had ordered final judgment against the defendant on 11 November 1988 for \$607,347.76 together with interest and costs in favour of the plaintiff. Hence this appeal by the defendant.

The plaintiff had applied by way of summons-in-chambers on 9 December 1987 for an order that it be at liberty to sign final judgment against the defendant for the sum claimed in the statement of claim, together with interest at 19% pa from 1 October 1986 to the date of judgment, and thereafter at 8% pa till the date of satisfaction, costs and further relief.

In its supporting affidavit with the relevant documents exhibited, the financial controller of the plaintiff had averred that the claim was in respect of 500,000 Everpeace Corporation shares. The plaintiff had offered to grant margin trading facilities to the defendant to enable him to buy and sell shares on the Exchange which offer was duly executed. The defendant consequently executed a formal margin agreement. The cost of the 500,000 Everpeace Corporation shares amounted to \$758,250 at the time of purchase on 9 October 1985.

As provided in the margin agreement, the defendant was to pay the plaintiff the margin deposit equivalent to 30% of the market value of shares bought. He in fact paid \$227,475 vide Standard Chartered Bank cheque no 122936. By Standard Chartered Bank cheque no 122946, the defendant had paid interest of \$1,562.20 for the month of October 1985. Statements of accounts had also been sent to the defendant from May 1986 to April 1987.

Learned counsel for the defendant had argued that the main line of arguments before the learned senior assistant registrar was that oral evidence was not admi-

ssible in view of s 92 of the Evidence Act 1950. He submitted that it did not apply where documents do not constitute a contract as the debit note for the purchase of the 500,000 shares was not signed by the defendant although his name had been typed in and that it stated that the shares were bought on the defendant's order. Counsel further alleged that the contract was actually between the plaintiff and Tan Koon Swan and not between the plaintiff and the defendant.

I had perused the affidavits and the documents relevant to the issue and am not in a position to see the connection with Tan Koon Swan for this claim. The relevant debit note dated 9 October 1985 states the name of the defendant in his personal capacity and the defendant had signed an undated margin agreement with the plaintiff. The offer letter from the plaintiff is dated 17 October 1985 and the defendant had in fact signed below it on 19 October 1985. He had even paid the 30% deposit required under the margin agreement for the shares bought and had paid the interest for October 1985 by letter dated 13 November 1985. The defendant was subsequently furnished with the relevant monthly statements of accounts, 12 of which had been exhibited, but he had made no objections, protests or queries on the matter.

The defendant had, by his affidavit filed on 5 November 1988, attempted to connect the plaintiff with Tan Koon Swan but having referred to the exhibited statement of defence in the other suit, namely, Ipoh High Court Civil Suit 23-202-86 where the plaintiff is the defendant and Tan Koon Swan the third party, it is clear that the action is founded on an entirely different transaction relating to Grand United Holdings and does not concern the purchase of the Everpeace Corporation shares.

Learned counsel for the plaintiff had also explained that the debit note had not been signed by the defendant as delivery was never made due to non-payment. By his affidavit dated 4 March 1988, the defendant had admitted signing the plaintiff's offer letter and the margin agreement but he insisted that he had executed the documents as agent for Tan Koon Swan. He alleged that the debit note was the wrong form used as a result of a mistake common to him and the plaintiff. Exhibited to that affidavit is a letter dated 7 October 1985 from Tan Koon Swan to the plaintiff as regards the purchase of Everpeace Corporation shares on 20 October 1985 to Ng & Co and a Mr Ng Koon Mun.

This affidavit and documents, to my mind, do not in any way support or substantiate the defendant's contention that he was the agent for Tan Koon Swan, as the name of Tan Koon Swan is never mentioned in the documents the defendant signed and the defendant's name is not mentioned in Tan Koon Swan's letter to the plaintiff. In the event, I could not accept the defendant's allegations that he was acting all along as agent of Tan Koon Swan,

especially when he had paid the 30% deposit and the interest due and had not protested at all to the relevant statements of accounts sent to him.

In *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka*,¹ the Federal Court had ruled that where it was quite clear from the sales invoice and the delivery note that the goods were ordered by the respondents, they should not be allowed to bring oral evidence to contradict the terms of the contract and to show that the goods were ordered for a third party. Consequently, I agreed with learned counsel for the plaintiff and the learned senior assistant registrar that no triable issues had been raised and dismissed the appeal with costs.

Subsequently, by summons-in-chambers filed on 28 June 1989, the defendant had applied for an order:

- (1) that execution on the judgment herein dated 11 November 1988 and all further proceedings thereon be stayed until the determination or other disposal of the appeal to the Supreme Court filed herein or until further order;
- (2) that execution on the judgment herein dated 11 November 1988 by writ of seizure and sale at No 4 Jalan Dato Khong Kam Tak, Ipoh be stayed absolutely or for such period and subject to such conditions as the court thinks fit.

Learned counsel for the defendant submitted that the plaintiff was heavily indebted and would utilize the judgment sum for outstanding liabilities, as a result of which the defendant would not be able to obtain repayment if he consequently won the appeal.

The defendant had also averred in his supporting affidavit that his last employer had died suddenly in 1982 and that he had ceased to be gainfully employed since the middle of 1984. He had been getting \$8,000 monthly and the loss of a job had resulted in his savings and investments being depleted by the end of 1985. He claimed that his wife and father had been supporting him and his family since 1986. He maintained that he had only \$3,000 worth of property in his wife's house and any execution would harass and humiliate his family. To avoid the embarrassment, he added that his wife and father were willing to deposit \$3,000 in court as a condition for the stay.

16 *Halsbury's Laws of England* (3rd Ed) had stated at p 35 that:

The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

The Federal Court in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors* (No 2)² had held that:

A An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances.

Here, however, one cannot actually say, apart from the averments of the defendant, that the plaintiff was in a state of poverty even if it used the judgment sum obtained here to pay off its other liabilities. Between the two parties, it is obvious that the plaintiff is, economically speaking, the stronger of the two. As for the stay of the writ of seizure and sale, the defendant had not even complied with the requirement under O 47 r 1(3) of the Rules of the High Court 1980 in not stating his present income, as he had stated that he is now a city councillor, and his assets and liabilities in full.

As a stay is a matter of discretion and as in this case I am of the view that the defendant had not shown any special circumstances to warrant a stay, suggesting a court deposit of \$3,000 for an appeal where the judgment sum is \$607,347.76 can hardly be said to be a substantial guarantee should the defendant fail in his appeal. In consequence, I had dismissed the defendant's application for stay pending appeal and the stay of execution of the writ of seizure and sale with costs.

E *Appeal and application dismissed.*

Solicitors: *Maxwell Kenion Cowdy & Jones; WY Chan & Roy.*

Reported by *Yap Shao Sin*

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